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TRACT

Using recent establishment clause decisions concerning vocal prayer, silent meditation, and prayer groups in the public schools, this article suggests that courts have applied the seemingly consistent doctrine of the tripartite test to arrive at quite different results, based in part on extralegal sources. Two such sources are the attitudinal variance among judges and the practical posture provided by administrators. The latter source, as exemplified in the prayer-group cases, can be an important and sometimes ironic influence on the judicial outcome. Hence, those school districts that seek to disallow access to such groups could do so either by developing a policy that severely limited extracurricular activities or, under a more open policy, by allowing access but maximizing sponsorship, support, and supervision. It is argued that school districts that seek to accommodate such groups should have an expansive policy that does not mention religion and that keeps involvement to a minimum. (Author/TE)

Recent Prayer-Related Court Decisions: The Effect of Judicial Attitudes and Administrator Actions

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ABSTRACT

Using recent Establishment Clause decisions concerning vocal prayer, silent meditation, and prayer groups in the public schools, this Article shows that courts have applied the seemingly consistently doctrine of the tripartite test to arrive at quite different results, based in significant but neglected part on extra-legal sources. Two such sources are the attitudinal variance among judges and the practical posture provided by administrators. The latter source, as exemplified in the prayer-group cases, can be an important, and sometimes ironic, influence on the judicial outcome. Thus, those school districts that seek to disallow access to such groups could do so either by developing a policy that severly limited extracurricular activities or, under a more open policy, by saying "yes!" and maximizing sponsorship, support, and supervision. Those school districts that seek to accomodate such groups should have an expansive policy without mentioning religion and by "yes" with as little involvement as possible.

A PRACTICAL ANALYSIS OF PRAYER-RELATED CASES: WITH A WINK AND A NOD

Perry A. Zirkel**

The range of public school activities that have been challenged as constituting the establishment of religion, in violation of the Constitution, is broad. These activities include reading from the Bible,[1] teaching evolution or creationism,[2] conducting Christmas programs,[3] and even providing a high school elective in transcendental meditation.[4] Three of the most prominent and current activities, as reflected in recent proposed amendments to the Constitution, are school prayer (characterized as "vocal" and "voluntary"), silent meditation (referred to as a "moment of silence"), and prayer groups (designated under the rubric of "equal access").

School officials faced with challenges to or requests for such activities are caught between what is colloquially called "a rock and a hard place," or what is mythologically analogized to "Scylla and Charybdis." Those citizens who challenge such activities typically point to the prohibition of the First Amendment's Establishment Clause. Those citizens who advocate such activities often point to the protection of the same Amendment's Free Exercise Clause. The school officials who have the responsibility for making and implementing policies in this area must find a way not only through this thicket of legal theory and doctrine, but also between the practical branches of emotions and politics.

On first impression, the judicial approach to such cases appears relatively consistent. Since 1971 the courts have used a so-called tripartite, or three-pronged, test for Establishment Clause cases.[5] Under this test, the courts ask three questions:

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1) whether the purpose of the policy is secular?

2) whether its primary effect neither advances nor inhibits religion?

3) whether it avoids excessive government entanglement with religion?

If the answer to any one (or more) of these questions is found to be "no," the policy is held to violate the Establishment Clause.[6]

Using the three aforementioned activities of school prayer, silent meditation, and prayer groups as examples, this Article will show that courts have used this seemingly consistent approach to arrive at quite different results based, in significant but neglected part, on extra-legal sources, including the practical posture of the case that is provided by school administrators.

Beyond the formal nuances of legal doctrine, the first source of variation in the outcomes of prayer-related cases is the difference in attitude among individual judges, partially reflecting shifts on the societal level and variance from one region to another.[7] These attitudinal differences are detectable even among the judges on the federal bench, which was established in part to be above the political influences on state judges. Recent prayer-related decisions provide examples of this attitudinal effect on the answer to each of the questions of the tripartite test. Thus, with respect to the secular-purpose question, the federal court in Massachusetts upheld a statute that required opening each school day with a moment of silence "for meditation or prayer," finding its purpose to be secular even though the statute had been enacted in the aftermath of litigation that ruled prayer in Massachusetts' public schools to be unconstitutional.[8] Yet in subsequent cases other federal district courts successively invalidated a moment of silence statute that was modeled directly on the Massachusetts law[9] and another that left out the word

"prayer" altogether,[10] finding their purpose in each case to be religious despite the lack of any formal written legislative history. Similarly, with respect to the primary-effect question, a federal district court found no violation for a state statute authorizing, and local practices independently mandating, vocal and voluntary school prayer. This court ruled that the Establishment Clause applied only to the federal government, not to the states, characterizing the contrary view as being "myopic, obtuse, and janus-like."[11] Yet the Eleventh Circuit Court of Appeals and the Supreme Court successively took the opposite view in these two consolidated cases.[12] As for the final prong of the tripartite test, two federal courts found the necessity of a teacher to monitor high school student prayer groups to constitute excessive government entanglement with religion, whereas another federal court ruled that such supervision would be only incidental and limited entanglement.[13]

A similarly significant but much more neglected source of variation in the outcomes of such litigation is the practical posture provided by the administrative actions in each case. For the sake of sharpened focus and limited space, let us take the aforementioned cases of high school prayer groups as an example.[14] Practically speaking, such situations typically start with a request from a group of high school students to use the school facilities at a time not part of the curricular day for voluntary nondenominational prayer and related religious activities. If the administration says "no" to the request, it faces the possibility of a suit on behalf of the requesting students based on their First Amendment rights of Free Exercise and Free Speech. If the administration says "yes" to the request, it faces the similarly real possibility of a suit on behalf of other students based on the aforementioned proscriptions under the Establishment Clause.

Somewhat like a person's response to a sexual overture, the nature of the administrator's answer and attendant actions will have a lot to do with the outcome of any resulting litigation. If the administration says "no," it seems clear that, based on a consistent body of case law, that the prayer-group students' Free Exercise claim will fail based on the lack of coercion -- i.e., that "the students, presumably living at home, are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place.[15] The success of their Free Speech claim, on the other hand, will depend on the extent that the school is determined to be a public forum. If the administration has allowed access to a broad spectrum of student groups, such as during a separate period for extracurricular activities, a reviewing court may consider the facilities to be a limited public forum, on which the administration would have to show a compelling reason to justify denial of access to the prayer group.[16] Unless the administration can show such a strong justification based on order and discipline or based on space limitations in combination with curricular relationship, which would be unlikely in most circumstances, its only alternative is to claim that providing equal access to student prayer groups would violate the Establishment Clause.

Thus, saying "no" to a student prayer group may well ultimately lead to the same legal issue as would arise from saying "yes" -- namely, whether allowing access would run afoul of the three-pronged test and thus violate the Establishment Clause. A court's answer to the three key questions of the tripartite test, however, may differ depending on whether the administration had said "no," "yes" or "yes!" If, as in our above-mentioned scenario, the administration had said "no," the court would apply the tripartite test to a hypothetical situation, as

if the administration had said "yes." Positing such a hypothetical situation, courts have tended to give the benefit of the doubt to the prayer group. Thus, for example courts that have decided prayer-group cases where the administration had said "no" have usually determined that the purpose of the hypothetical equal access policy was secular -- namely, the encouragement of extracurricular activities.[17] Yet in one of these key cases there was no evidence of any policy at all, much less of any other extracurricular activities during the requested time period.[18] In contrast, in the one reported case where the administration had adopted a policy that expressly allowed equal access to religious as well as secular student groups and had said "yes" in accordance with that policy, the court found the policy to violate the secular purpose prong.[19] Thus, oddly enough, if school officials want to allow access to student prayer groups and survive judicial scrutiny under the first part of the tripartite test, they might do well by saying "no" and thereby look good to their anti-prayer constituents while losing the lawsuit to their pro-prayer constituents.

Judicial determination of the primary-effect question will depend largely on whether granting access to a prayer group will be perceived by the other students as conferring an imprimatur of official approval on religious groups or practices. Where school officials have said "no," courts have been left to consider the hypothetical situation of whether an affirmative policy toward prayer groups would have been perceived as endorsing or encouraging them. The judicial results have been mixed, depending in part on whether such a policy would have seemingly provided official recognition (e.g., inclusion in the school yearbook), use of the school's formal communications (e.g., bulletin boards, public address system, student newspaper), budgetary sources (e.g., supplies and faculty advisor). For example,

in the case that provided (until its recent reversal) the only direct support for student prayer groups, the court emphasized that "[a]lthough the plaintiffs seek what they call 'equal access,' it is important to emphasize they really seek something less than 'equal' treatment."[20] Thus, again ironically enough, an administration wanting to successfully grant access to a prayer group should minimize what they are providing beyond time, space, and the permission to use them, whereas an administration wanting to keep such a group out might, where a suit is in sight, best say "yes!" to the request for access and bend over backward to provide encouragement to and endorsement of the group. Similarly, in terms of the excessive-entanglement prong, school officials who say "yes" might optimize their odd of winning an Establishment Clause suit by respectively maximizing or minimizing the amount of supervision over the prayer group meetings, depending on whether they want or do not want to effectively grant access.[21] Predicting an effective posture for school officials who say "no" is more problematic. In its only prayer group decision to date, which arose from the denial of access on the university level, the Supreme Court seemed to endorse an approach of comparing the extent of supervision needed for a policy excluding religious groups with that needed for a policy including such groups.[22] Not only is the latter side in such a comparative approach hypothetical, but also supervision for the purpose of safety and order is not necessary in the university context. The results of such a comparative analysis for the denial of access on the high school level, where supervision for ensuring safety is involved along with supervision for enforcing compliance, are unclear.

In sum, it can be seen from the prayer-related cases in recent years that school officials have an underestimated degree of influence on the judicial application of the doctrine developed under the Establishment Clause. When, for example, faced with the requests for equal access by student prayer groups, school

administrators and board members may significantly increase their chances of effectively "passing" the courts' tripartite test with a carefully developed policy and an artfully orchestrated answer. Thus, those school districts that seek to disallow access to such groups could do so either by developing a policy that severely limited extracurricular activities or, under a more open policy, by saying "yes!" and maximizing sponsorship, support, and supervision. Those school districts that seek to accommodate such groups could best do so by developing an expansive policy without mentioning religion and by implementing it with minimal involvement.

If this analysis seems to be tinged with a sense of practicality, reality, irony, or even cynicism, consider, for example, this court's rationale for permanently enjoining a school district from reworking its policy for silent prayer or meditation:

> [Withough a permanent injunction] the defendants would be more careful to disguise their purpose the next time. With a wink and a nod, they could discuss the secular purposes for the moment of silence, and prohibit any mention of the school prayer issue.[23]

Thus, accept this Article's nontraditional analysis in the same way that it is written -- with a wink and a nod.[24]

Footnotes

[1]See, e.g., Crocket v. Sorensen, 568 F. Supp. 1422 (W.D. Va. 1983).

[2]See, e.g., McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).

[3]See, e.g., Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980), cert. denied, 449 U.S. 987 (1980).

[4]See Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979).

[5]See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971).

[6]For the sake of simplicity, prongs 2 and 3 have been recast here in the negative. For example, the third question is typically formulated in terms of whether the challenged policy "fosters" excessive entanglement. Answering this question "yes" is equivalent to answering the "avoids" version with "no."

Similarly, these questions are posed with respect to the generic use of "policy," whereas in some cases it is a specific statute, activity, or even decision. See, e.g., May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983)(statute); Widmar v. Vincent, 454 U.S. 203 (1981)(policy); Jaffree v. Board of School Comm'rs, 708 F.2d 1526 (11th Cir. 1983)(activity); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981)(see note 17 and accompanying text 18 infra).

[7]Cf. Combs, The Federal Judiciary and Northern School Desegregation: Judicial Management in Perspective, 13 J. L. & EDUC. 345, 368 (1984)(effects of individual judges' perceptions and of marked political interactions in desegregation cases); M. REBELL & A. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS 33, 215 (self-circumscribed political role of judges in education law cases more generally); Van Geel, Two Models of the Supreme Court in School Politics in THE POLITICS OF EDUCATION 124, 161 (C. Hooker ed. 1977)(decisions of Supreme Court justices seen as determined by personal preferences and role conceptions).

[8]Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976).

[9]Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013 (D.N.M. 1983).

[10]May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983).

[11]Jaffree v. James, 554 F. Supp. 1130 (S.D. Ala. 1983); Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1129 (S.D. Ala. 1983).

[12]Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), rehearing denied, 713 F.2d 614 (11th Cir. 1983), aff'd mem., — U.S. —, 104 S.Ct. 1704 (1984).

[13]Compare Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983) with Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981). However, the lower court's ruling in the first case was reversed, on a 2-to-1 vote, in Bender v. Williamsport Area School District, 741 F.2d 538, 557 (3d Cir. 1984).

[14]Given the focus on variance in court decisions, this analysis does not take into account the recently enacted Equal Access Act or the guidelines published pursuant thereto. See 130 CONG. REC. H12270 (daily ed. Oct. 12, 1984)(statement of Rep. Bonker).

A recent survey by AASA revealed that approximately 28% of 479 responding school districts had received requests from student groups to use school facilities for religious meetings and that almost one third of these districts had denied the requests. See Educ Week at 6, col. 5 (Nov. 21, 1984).

[15]Bender, 563 F. Supp. at 703, citing Brandon, 635 F.2d at 977.

[16]Compare Bender, 741 F.2d at 550 with Lubbock, 669 F.2d at 1048.

[17]Brandon, 635 F.2d at 973; Bender, 741 F.2d at 551; Johnson v. Huntington Beach Union High School Dist., 137 Cal. Rptr. 43, 49 (Ct. App. 1977), cert. denied, 447 U.S. 870 (1977).

[18]Brandon, 635 F.2d at 973; cf. Nartowicz v. Clayton County School Dist., 736 F.2d 646, 648 (11th Cir. 1984).

[19]Lubbock, 669 F.2d at 1044-45; cf. Bell v. Little Axe Indep. School Dist., Civ. No. CIV-81-620-T, slip op. at 13 (W.D. Okla. Mar. 11, 1983).

[20]Bender, 563 F. Supp. at 711, rev'd, 741 F.2d at 823.

[21]See e.g., Bell, slip op. at 16-18.

[22]Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981).

[23]Duffy, 557 F. Supp. at 1023.

[24]Perhaps the "wink and a nod" award should go to the member of the Texas Borad of Education who, in casting the lone dissenting vote to a recent repeal of the decade-old requirement that evolution be presented in textbooks as "only one of several explanations," defended the policy - in response to the state attorney general's opinion that its purpose was not secular - as making no mention at all of creationism.